IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 907 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR. JUSTICE ANANT S DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SALIMKHAN AHMADKHAN PATHAN

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 907 of 1999

MRS SHILPA J UNWALLA for Appellant

Mr. N.D. Gohil APP for Respondent

CORAM : HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR. JUSTICE ANANT S DAVE

Date of decision: 21/04/2005

C.A.V JUDGEMENT

(Per : HON'BLE MR. JUSTICE ANANT S DAVE)

1. This appeal is filed by the appellant-convict through jail. Learned advocate Mrs. Shilpa Unnwala is appointed to represent the case on behalf of the appellant. The appeal came to be admitted by the Court (Coram: J.M. Panchal & J.R.Vora, JJ.) by order dated 25th January 2002.

2. This appeal under Section 378 of the Code of Criminal Procedure challenges the judgment and order dated 9th August 1999 passed by the learned Additional Sessions Judge, Court No.13, Ahmedabad, in Sessions Case No.289 of 1998, by which, the appellant [original accused] is convicted of the offence punishable under Sections 489-B, and 489-C of the Indian Penal Code, and sentenced to undergo R.I. for ten years and fine of Rs.5000, in default, R.I. for six months for offence punishable under Section 489-B of the Indian Penal Code, and R.I. for five years and fine of Rs.2000, in default, R.I. for three months for offence punishable under Section 489-C of the Indian Penal Code. Both the sentences are ordered to run concurrently.

3. It is the case of the prosecution that on 7th May 1998, Police Inspector, B.A. Tiwari, was performing his duties at Ahmedabad City Railway Police Station and he was present at the police station situated on platform No.1. At about 20.10 hrs on 7th May 1998, one head constable, Mahipatsinh Kanubha Jhala, of surveillance squad, had informed him that one person wearing black pant and brown check shirt was selling contraband near the steps of the computer building and the said brown colour power is used for intoxication. The said information was entered into the station diary being Entry No.33 of 1998 at 20.15 hrs and, thereafter, panchas were called. Shri Tiwari, Police Inspector, along with the panchas, had gone near the steps of the computer building and carried out the raid. When the person, who was sitting on the steps of the computer building, was asked to disclose his name, he stated that he is Salimkhan Ahmedbhai, aged 64 years, residing at Indiranagar, Bhopal. During his search in person, 5 gram brown sugar worth Rs.5000 and 10 gram charas worth Rs.500 and a currency note of Rs.100 bearing No.RG-2-626W782 were found. When the said muddamal was scrutinized, the said currency note was found to be fake one and the same was taken into custody by the police. So far as the contraband, namely, charas and brown sugar found from the accused, is concerned, Police Inspector, Shri Tiwari has

registered offences punishable under Sections 8C and 21 of the NDPS Act at C.R. No.I-3237 of 1998 against Salimkhan. Besides, said Salimkhan was interrogated for the fake currency note of Rs.100. During the enquiry, it was found out that the accused had tried to use the said fake currency note of Rs.100 at Dairy Den parlour situated at platform No.1 to buy a sandwich and one Shri Kalpesh Rajnikumar, who was manning the said counter, on seeing the said currency note, found that the corner of the note was divided into two portions and was sticky. Therefore, he told the accused that the said note was fake one and, therefore, the accused had immediately snatched that note and had gone away. During the enquiry, Shri Tiwari had come to know that the accused had made attempt to put the said fake currency note in transaction by buying sandwich from Dairy Den parlour as genuine currency. Panchanama of person of Salimkhan was drawn, the muddamal was seized and the panchanama was prepared. On 12th May 1998, the said fake currency note was sent to the Security Press at Nasik for its opinion. The statements of various persons were recorded. The remand of the accused was obtained, thereafter, he was sent to judicial custody and he was chargesheeted on 1.8.1998. As the aforesaid offence was triable by the Sessions Court, the learned Metropolitan Magistrate committed the case to the Sessions Court.

4. The learned Additional Sessions Judge had framed charge Exh.1 against the appellant. The charge was read over and explained to the appellant, who had pleaded not guilty to the same and claimed to be tried. The accused was unable to engage an advocate in view of his poor financial condition and, therefore, one Shri K.D. Mehta, advocate, was appointed to defend the case of the accused.

5. In order to prove its case against the respondent, the prosecution had examined (1) P.W.1, Sunildatt Pitamberdatt Sharma, Exh.9, (2) P.W.2, Balkeshwarprasad Avadhbihari Tiwari, Police Inspector, Exh.12 (complainant), (3) P.W.3, Khumansinh Jipsinh Rathod, Exh.16 (Head Constable), (4) P.W.4, Mahipatsinh Kanubha Jhala, Exh.17 (Head Constable); (5) P.W.5, Kalpesh Rajnikant Shah, Exh.18, and (6) P.W.6, Padamsinh Vakhatsinh Champavat, Exh.19 (Police Sub-Inspector). The prosecution has also produced documentary evidence such as complaint Exh.18, report of the incharge officer at Exh.14, arrest panchanama at Exh.21, arrest memo at Exh.22, report of arrest by police Exh.23, seizure of muddamal currency at Exh.15, report of fake currency note Exh.24, etc. to prove its case.

6. The learned trial judge has discussed evidence of panch of panchanama at Exh.11, P.W.1, S. P. Sharma Exh.9, and report of currency note of Rs.100 Exh.24.The learned trial judge mainly relied upon the prosecution witnesses, police inspector and complainant P.W.2, Tiwari, and his deposition at Exh.12 and also taken into consideration the panchanama at Exh.11, coupled with evidence of P.W.3, Rathod (Head Constable) Exh.16. It was held that the prosecution proved its case against the appellant. The panchas have identified the accused in the court. It is held by the learned trial judge that the defence is not able to prove that the panch witness happened to be the railway contractor and, therefore, he deposed in favour of the prosecution, and also that the very same accused was in possession of the contraband, namely, charas and brown sugar. In view of the abovereferred to conclusion, the learned trial judge has convicted and sentenced the appellant as stated in paragraph 1 of this judgment. The appellant-accused, feeling aggrieved by the same, filed the present appeal.

7. Heard the learned advocates for the parties.

8. Mrs. Shilpa Unnwala, learned advocate for the appellant, has contended that the evidence of P.W.5, Kalpesh, Exh.18, is not trustworthy and does not support the case of the prosecution. She contended that there was no test identification parade held immediately and the appellant was identified after 1 years three months. She has further contended that the documents were prepared in the police station itself and, therefore, the same cannot be relied on for the purpose of convicting the appellant. The statement of P.W.5, Kalpeshbhai, is not trustworthy and no customers of Dairy Den were examined by the prosecution to corroborate the evidence of P.W.5, Kalpeshbhai. The statement of P.W.2, Tiwari, Police Inspector, is also not trustworthy and the evidence of police witnesses and the panch witnesses are contradictory. The possession of fake currency with the appellant is not proved by the prosecution. She has further submitted that merely on the basis of evidence of P.W.5, Kalpesh, Exh.18, that the appellant had given him a fake currency note of Rs.100, mens rea cannot be presumed and, therefore, the appellant is entitled to acquittal. She, therefore, submitted that, in view of the uncorroborated evidence on record, the conviction and sentence recorded by the learned trial judge deserves to be reversed by this Court and the appeal deserves to be allowed.

9. Learned Additional Public Prosecutor had defended the judgment of the learned Additional Sessions Judge. He has contended that from the evidence of P.W.1, Sunildatt Pitamberdatt Sharma, Exh.9, P.W.2, Balkeshwarprasad Avadhbihari Tiwari, Police Inspector, Exh.12, P.W.3, Khumansinh Jipsinh Rathod, Exh.16, (4) P.W.4, Mahipatsinh Kanubha Jhala, Exh.17, and P.W.5, Kalpesh Rajnikant Shah, Exh.18, the only conclusion can be drawn on the basis of appreciation of evidence of the aforementioned witnesses that the accused had, in fact, committed the crime punishable under Section 489-B AND 489-C of the Indian Penal Code and the offence is destructive offence and being a social evil, the learned Additional Sessions Judge has rightly convicted the appellant-accused.

10. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence with reference to broad and reasonable probabilities of the case.

11. In cross examination, P.W.5, Kalpeshbhai, stated that he was not sure when the police had taken his statement and he did not know about the date. However, he stated that such statement might have been taken by the police within 8 to 10 days of the incident of currency note of Rs.100. He did not remember which officer had taken his statement since 1.1/4 year had passed and he did not remember the name of the officer. He stated that it is true that he has not stated in his statement that after taking money he had prepared the bill. He stated that it is true that he has not stated that, "I have told that note does not seem proper". He has not stated that "its number is not in straight line, and while touching with hand the paper was found sticky". However, out of staff of 30 to 32 employees of Dairy Den, at the time of incident, only 10 to 12 persons were present and he was supposed to manage the whole work of parlour and to pay attention. He stated that it is true that time of departure of Gujarat Mail is 10 p.m. and he denied that 'Gujarat Mail' arrived at 8 o' clock at the platform. He stated that it is true that normally passengers move freely at the platform and he did not inform the police when he had suspected about the currency note. Not only that, but he had not informed Railway Protection Force or GRP. At that time one or two persons might have come to the counter for purchase and he had transacted only for one or two minutes with the accused. He stated that the computer building is little away from the parlour and it takes one or two minutes. It is true that he had not given description of the

accused and he came to know only after 10 to 15 minutes, when there was shouting, and he came to know that some person selling drugs was arrested. He stated that there is a common wall between the parlour and the police station and due to noise he came to know about the same. He was at the counter and did not go anywhere. He has denied that he gives false deposition because his parlour is situated near police station. At this point of time, the Court has put a question to Kalpeshbhai, "you have seen the accused on the day of incident and today could you identify him and, if so, on what basis ?" In reply, the witness stated that, "I have seen the accused at that point of time, who was aged. I remember the accused by his face and hair on the head. In cross examination, the said witness deposed that number of persons do come to the counter and it is true that even at the platform also, number of persons like the accused are found. He stated that he was busy in his work and he further stated that it is true that a lot of persons came and, therefore, it is difficult to remember the face of the person. He denied that, before he came to the Court, the accused was shown. He further stated that number of aged persons had come. He further reiterated that the description of accused as narrated by him in the Court was not recorded by the police in his statement.

12. The Police Sub-Inspector, Tiwari, in his cross examination, stated that the currency note, which was seized by him from the accused, was not kept in a sealed cover and he admitted that he had not received any information about the fake currency note. He was also unable to remember whether information was given by Kalpeshbhai of Dairy Den.

12.1 P.W.3, Rathod, Exh.16, stated that he, being a member of the surveillance squad, was present on 7.5.1998 at about 20.15 hrs. He, by and large, supported the case of the prosecution.

12.2 P.W.6, Champawat Exh.19, who was PSI in the Local Crime Branch of Railway Police, stated that he had received complaint, panchanama and muddamal. He identified muddamal currency note and the accused. It is pertinent to note that, in cross examination, he stated that on 9.5.1998, he had taken statements of Kalpeshkumar, and Head Constables Khumansinh and Mahipatsinh. Thereafter, he deposed that he had taken the said statements on 10.5.1998, and not on 9.5.1998. He stated that he has recorded the statement of Kalpeshkumar of Dairy Den only, and not of any other person. He admitted that he has signed on the seized

muddamal currency note and he has not held any identification parade before the Executive Magistrate.

13. Looking to the evidence, as discussed hereinabove, it is clear that P.W.5, Kalpesh R. Shah, has not supported the case of the prosecution and, on the contrary, he has denied that he had never got his statement recorded by stating that the currency note of Rs.100 presented by the accused at the counter did not seem to be proper and he had not stated about the number in a straight line. He also stated that he never stated that the paper of the currency note was sticky. He has further accepted that, on platform No.1 and nearby counter, number of passengers were there and it is difficult to remember the face of a person since number of persons with similar appearance like the accused can be found at the railway station and the very fact that he had encountered with the accused only for two minutes and after 1.1/4 year, he had identified him in the court only. As stated by the Investigation Officer, no T.I. parade was held. Further, P.W.5, Kalpesh R. Shah, is not sure about the time and date when his statement was recorded by the police. P.W.6. Padamsinh, PSI, in his cross examination, stated that initially the statement of P.W.5, Kalpesh R. Shah, was recorded on 9.5.1998 and, thereafter, changes it to having been recorded on 10.5.1998. There is still lacuna about sealing of muddamal note which was recovered by P.W.2, Tiwari, PSI. In his cross examination, he stated that he has not placed the said currency note in a sealed cover. He further stated that he has not received any information about the said note.

14. It is pertinent to note that, P.W.5, Kalpesh R. Shah, failed to inform the police immediately and, thereafter, came to know about the arrest of some person after some time, which is unbelievable. No explanation has come forth from the prosecution about the time which they have spent for recording statements of P.W.5, Kalpesh R. Shah. After two days of the incident, as per the statement of PSI,Rathod, on 10.5.1998, the statement of P.W.5 was recorded, who had deposed in cross examination that his statement was recorded after 8 to 10 days of the incident. Thus, there are contradictions in the depositions of P.W.5, Kalpesh R. Shah, and P.W.2, Tiwari, and P..W.3 Khumansinh.

Section 489-B and Section 489-C read as under:

"489-B. Using as genuine, forged or counterfeit currency-notes or bank-notes.- Whoever sells to, or buys or receives from, any other person or otherwise traffics in or uses as genuine, any forged or counterfeit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.
489-C. Possession of forged or counterfeit currency-note or bank-notes.- Whoever has in his possession any forged or counterfeit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit and intending to use the same as genuine or that it may be used as genuine, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both."

Section 489-B deals with an offence using as genuine, forged or counterfeit currency-notes or bank-notes, whereas Section 489-C deals with possession of forged or counterfeit currency-note or bank-notes. In the present case, knowledge and even mens-rea are attributed to the accused, in which, no direct evidence is adduced by the prosecution. Even while seizing the muddamal contraband, and searching the suit case, total currency worth Rs.18,650/- was found, which contained denominations of 2 x Rs.500; 16 x Rs.100; and 120 x Rs.50. In this seizure, no fake currency note was found. Had there been mens-rea on the part of the accused while dealing with or transacting into the currency notes, there could have been many more such notes. Even the prosecution has not further enquired into the details about indulgence of the accused whether he had entered into similar transaction on earlier occasion or not and no further evidence is laid, except certain statements of police personnel and one panch and P.W.5, Kalpesh R. Shah, whose deposition is full of contradictions and not trustworthy. On these facts, we have no option but to hold that the charges framed under Sections 489-B and 489-C are not proved.

15. Our attention has been drawn by learned counsel Smt. Unnwala to the judgment of the Supreme Court in the case of Umashanker v. State of Chhatisgarh, AIR 2001 Supreme Court 3074, about mens-rea and knowledge about the crime, in support of her submission that, in the present case, no case is made out against the accused for the offences punishable under Sections 489-B and 489-C of the Indian Penal Code and the conviction recorded by the trial court deserves to be quashed and set aside.

16. Following the decision the judgment of the Supreme Court in the case of Umashanker v. State of Chhatisgarh, AIR 2001 Supreme Court 3074, which is squarly applicable to the facts of the present case, the judgment and order dated 9th August 1999 passed by the learned Additional Sessions Judge, Court No.13, Ahmedabad, in Sessions Case No.289 of 1998, is set aside and the appellant is acquitted of the charges framed against him.

17. In the result, the appeal is allowed. The conviction of the appellant for the offence punishable under Sections 489-B, and 489-C of the Indian Penal Code, and sentence imposed on him to undergo R.I. for ten years and fine of Rs.5000, in default, R.I. for six months for offence punishable under Section 489-B of the Indian Penal Code, and R.I. for five years and fine of Rs.2000, in default, R.I. for three months for offence punishable under Section 489-C of the Indian Penal Code, by the learned Additional Sessions Judge, Court No.13, Ahmedabad, vide judgment and order dated 9th August 1999 in Sessions Case No.289 of 1998, are quashed and set aside. The appellant is ordered to set at liberty forthwith, if he is not required in connection with any other case. The muddaml be disposed of in terms of the directions given by the learned Additional Sessions Judge, Court No.13, Ahmedabad, in judgment and order dated 9th August 1999.

(R.P.Dholakia)
Judge

(Anant S. Dave)
Judge

(swamy)